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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-608

KATHLEEN M. PIETEUNTI,

Petitioner,

vs.

BOARD OF EDUCATION OF BRICK TOWNSHIP, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-408

KATHLEEN M. PIETRUNTI,

Petitioner,

vs.

BOARD OF EDUCATION OF BRICK TOWNSHIP, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The order of the Supreme Court of New Jersey denying certification to review the decision of the Appellate Division of the Superior Court of New Jersey was rendered without opinion on July 22, 1974, and is set forth at Appendix B (26a) of the petitioner's petition.

The opinion of the Appellate Division of the Superior Court, rendered April 23, 1974, is reported in 128 N.J. Super. 149, 319 A.2d 262, and is set forth in Appendix A (1a) of petitioner's petition. This judgment affirmed petitioner's dismissal from employment with the school district of the Township of Brick, Ocean County, New Jersey, directed by the Commissioner of Education of the State of New Jersey, which was affirmed by the New Jersey State Board of Education. The Commissioner's Decision is dated July 22, 1972, and is set forth in Appendix C (27a) of the petition. The State Board's Decision is dated April 4, 1973, and is set forth in Appendix D (26a) of the petition.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Question Presented

Whether a teacher can be dismissed on the basis of her intemperate and vituperative attacks on her superior, her "unprofessional" language, and her urging of other faculty members to disobey regulations of the school board?

Constitutional Provisions Involved

The applicable United States constitutional provisions are the first and fourteenth amendments.

Statement

Petitioner's concise statement is accepted with the following corrections and additions: The Commissioner of Education did not hold that the orientation day speech was the sole reason for the discharge, as the petitioner alleges at p. 6 of the petition. Rather, the Commissioner and the Appellate Division also expressly considered the petitioner's instruction to teachers not to comply with any request that would make the Board's job any easier (98a), and her urging of all teachers not to return "intent" letters (98a). Also, the petitioner's use of the phrases "son of a bitch" and "bald-headed mental midget," among others, was held by the Commissioner not to be constitutionally protected.

ARGUMENT

I.

The decision below is clearly correct.

An analysis of this Court's opinion in *Pickering* v. *Board of Education,* 391 U.S. 563 (1968), mandates a conclusion that the decision of the Appellate Division of the New Jersey Superior Court is clearly correct.

The decision of the Appellate Division of the Superior Court of New Jersey clearly follows the teaching of *Pickering,* in recognizing that a teacher's first amendment rights are not absolute. As this Court stated in *Pickering*:

> At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly

> from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

391 U.S. at 568.

This general principle that the first amendment rights of a public employee are not absolute has been recently reiterated by this Court in *Arnett* v. *Kennedy*, —— U.S. ——, 94 S. Ct. 1633 (1974).

The Appellate Division's opinion cannot be interpreted to hold that the petitioner forfeited her rights of free speech because of her status as a teacher. Rather, it recognizes that the petitioner's rights of free speech must be balanced against the respondent school board's interest in promoting the efficiency of the public services it performs.

It should be noted that the petitioner was not dismissed because of the content of her speech, but rather, because of the potentially disruptive effect her speech had on the efficient operation of the school system. Such a rationale is entirely consistent with the teaching of *Pickering*.

In recognizing "the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal," this Court "[did] not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged." 391 U.S. at 569. However, this Court articulated certain factors, the presence of which would take the teacher's statements out of the protection of the first amendment:

> (1) Whether the statements were directed toward any person with whom the teacher would normally be in contact in the course of her daily work as a teacher, thus raising the question of maintaining either discipline by immediate superiors or harmony among co-workers.

391 U.S. at 569-70.

> (2) Whether the teacher's relationship with the target of the criticism was the kind of close working relationship which required personal loyalty and confidence.

Id. at 570.

> (3) Whether the statements had any detrimental impact on the operation of the school or on the performance of the teacher's daily duties.

Id. at 572-73.

> (4) Whether the statements were matters of legitimate public concern.

Id. at 571. *See also Clark* v. *Holmes*, 474 F. 2d 928, 931 (7th Cir. 1972), *cert. denied*, 411 U.S. 972 (1973).

Applying these guidelines to the instant case, it is clear that the Appellate Division opinion, holding that there has been no violation of the petitioner's first amendment rights, is correct.

The respondent's interest in "encouraging a close and personal relationship between the employee and his superiors" clearly outweighs the petitioner's right to absolute freedom of speech. In *Chitwood* v. *Feaster*, 468 F. 2d 359 (4th Cir. 1972), holding that bickering and running disputes with one's superiors were not "protected speech," the court concluded that:

> A college has a right to expect a teacher to follow instructions and to work cooperatively and harmoniously with the head of the department. If one cannot or does not, if one undertakes to seize the authority and prerogatives of the department head, he does not immunize himself against loss of his position simply because his noncooperation and aggressive conduct are verbalized.

468 F. 2d at 361.

Similarly, in concluding that the right of a public school teacher to criticize the school administration on matters of public concern was a limited right, the Fifth Circuit in *Moore* v. *Winfield City Board of Education*, 452 F. 2d 726 (5th Cir. 1971), held that the Board's failure to renew a teacher's employment contract, after the teacher made a speech disparaging co-workers, teachers, and the school administration, was not motivated by the teacher's exercise of her constitutionally protected freedom of expression.

Since the petitioner's statements were directed towards the superintendent of schools, a person with whom the petitioner, by necessity, should have a close working relationship, and were detrimental to harmony among co-workers and the maintaining of discipline, these statements were not "protected speech." Accord, *Watts* v. *Board of Curators, University of Missouri*, 363 F. Supp. 883 (W.D. Mo. 1973), *aff'd*, 495 F. 2d 384 (8th Cir. 1974); *Bowles* v. *Robbins*, 359 F. Supp. 249 (D. Vt. 1973); and *Watts* v. *Seward School Board*, 454 P. 2d 732 (Alas. 1969), *cert. denied*, 397 U.S. 921 (1970). As stated in *Watts* v. *Seward School Board, supra*:

> What appellants did . . . could not help but be detrimental, not only to discipline, but also to harmony among appellants' co-workers . . . .

454 P. 2d at 735.

The petitioner's direction to faculty members, urging them to refuse to comply with an administrative request that they file letters with respect to their intentions for the succeeding year, is clearly not "protected speech." In *Whitsel* v. *Southeast Local School District,* 484 F. 2d 1222 (5th Cir. 1973), a teacher, who encouraged disobedience to directions given to the students by the principal to return to their classes during a demonstration, was dismissed. The court concluded that the fact that the teacher's remarks impliedly countermanded the direction of his superior placed those remarks outside the protection of the first amendment, and thus his dismissal did not contravene constitutional protections. *See also Tygrett* v. *Washington,* 346 F. Supp. 1247 (D.D.C. 1972).

In the instant case, the interests of the respondent school board in knowing which teachers would be returning the following year, in maintaining the loyalty of the teachers to the school system, and in discipline, clearly outweigh the petitioner's alleged free speech right.

Unquestionably, a teacher's use of vituperative and intemperate language is not protected by the first amendment. In *Amburgey* v. *Cassady,* 370 F. Supp. 571 (E.D. Ky. 1974), the court held that a teacher who was excessively critical and derisive of duly constituted school authorities, and who denounced them personally in abusive language to other teachers and school staff personnel, abused her right to criticize internal school operations, and thus her constitutional rights were not violated by the failure of the board of education to reemploy her. Similarly, in *Duke* v. *North Texas State University,* 469 F. 2d 829 (5th Cir. 1973), *cert. denied,* 412 U.S. 932 (1973), the court of appeals held that the use of profane language in a university teaching assistant's speeches criticizing the university administration and policies were not protected by the first amendment:

> As a past and prospective instructor, Mrs. Duke owed the University a minimal duty of loyalty and civility to refrain from extremely disrespectful and grossly offensive remarks aimed at the administrators of the University. By her breach of this duty, the interests of the University outweighed her claim for protection.

469 F. 2d at 840.

Similarly, in *Starsky* v. *Williams*, 353 F. Supp. 900 (D. Ariz. 1972), in holding that the plaintiff's calling a school official a "bastard" was not subject to first amendment protection, the court concluded that the school's interest in discipline in demanding some minimum of courtesy in a faculty member's relationships with school officials outweighed the free speech interest. 353 F. Supp. at 917.

In *Jones* v. *Battles*, 315 F. Supp. 601 (D. Conn. 1970), the district court held that statements by a teacher at an open public hearing before the school board in which the teacher labeled the director of secondary education a liar and questioned the honesty and competence of the director and the entire administrative staff of the board of education was not constitutionally protected. The refusal of the board of education to renew the teacher's contract did not violate his right to freedom of speech. The court stated:

> The Court finds that plaintiff's abusive language directed toward his nominal superior was of such a nature as to destroy any likelihood of future amiable professional relationship between him and the administrative staff. To order that the plaintiff be rehired into this school system under Dr. Barry's general supervision would invite friction and destroy staff morale. Those who would ultimately

> suffer as a result of such an enforced relationship would be the school children.

315 F. Supp. at 608.

The petitioner alleges that since her statements were on matters of public concern, they are constitutionally protected. However, as the Appellate Division correctly noted:

> [A]ppellant chose to ignore those issues as a matter of public concern and distorted them into a vehicle to bring scorn and abuse on the school administration in general and the superintendent of schools in particular. In doing so, she forfeited her claim to First Amendment protection.

Petitioner's petition for certiorari at 19a.

There is no requirement of a showing of actual disruption of the operation of the school system, since the factors articulated in *Pickering* are present in the instant case. As stated by the Fifth Circuit in *Birdwell* v. *Hazelwood School District*, 491 F. 2d 490 (8th Cir. 1974):

> In a situation of potential disruption there is no requirement in the law that the proper authorities must wait for the blow to fall before taking remedial measures.

491 F. 2d at 494.

The Appellate Division correctly rejected the petitioner's attempt to clothe herself with additional first amendment protection because she was a union official. The petitioner was not dismissed on the basis of her union activity. Courts have rejected the assumption that whenever a teacher who is active in union affairs is not rehired, the school board's action automatically is deemed to

infringe on the teacher's first amendment rights. *See, e.g., Simard* v. *Board of Education of Town of Groton*, 473 F. 2d 988 (2d Cir. 1973).

It should be noted that the orientation day address was not made at a meeting of the teacher's association and did not concern the subject matter of negotiations then going on between the teachers and the administration. Rather, as the petitioner herself pointed out, the labor negotiations had already been successfully resolved. Thus, the petitioner's statements transcended the prior labor difficulties between the parties and reached the level of a vituperative and intemperate personal attack on the superintendent. Since the statements of the petitioner were directed toward a person with whom she would normally be in contact, her comments threatened to disrupt the operation of the school system. Therefore, these statements were not protected by the first amendment. This conclusion is supported by the recent district court decision of *Magri* v. *Giarrusso*, 379 F. Supp. 353 (E. D. La. 1974). In *Magri*, the court held that a police officer, who was both a sergeant on the police force and the president of the policemen's union, did not have a protected right to make public statements pertaining to the superintendent of the police department when such statements were insubordinate, bordered on the defamatory, vitriolic, and threatened significant working relationships vital to the administration of the police department. The court recognized that responsible public criticism of public officials should be encouraged; however, the court held that vitriolic remarks which threatened the efficiency of the public services performed were outside the scope of protected speech. While recognizing that, as union president, the permissible extent of the plaintiff's criticism may be greater, the court concluded that the plaintiff's criticism in the capacity of union

president has limits implicit in his status as a member of the police department, such limits being overreached by his vitriolic remarks. Similarly, the present petitioner's position as union president did not offer her absolute protection for remarks that threatened the operation of the school system.

The petitioner's use of the "defamation" analogy is inapposite to the instant case. As this Court stated in *Pickering*:

> We have already noted our disinclination to make an across-the-board equation of dismissal from public employment for remarks critical of superiors with awarding damages in a libel suit by a public officer for similar criticism.

391 U. S. at 574.

Pickering holds that the "actual malice" standard of "false statements knowingly or recklessly made" is to be applied in teacher dismissal cases only after the court has preliminarily concluded that the teacher's interest in speaking out on matters of public concern outweighs the state's interest in protecting the public services it performs. If the balancing test is resolved in favor of the school board, as it should in the instant case, the Court need not consider the "actual malice" test.

II.

There is no conflict of decisions.

Since the petitioner's remarks were outside the ambit of first amendment protection, under the *Pickering* balancing test her dismissal did not violate either her right

of association or the right of association of those whom she represented as president of the union. Lower court cases which arguably support an opposite conclusion are inapplicable and not in conflict with the instant case. In other cases, none of the indicia articulated in *Pickering* which would take the statements out of the sphere of protected activity were present. As discussed above, several of these factors are present in the instant case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent.